

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1066

b
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN MEJIAS, JR.,

Appellant.

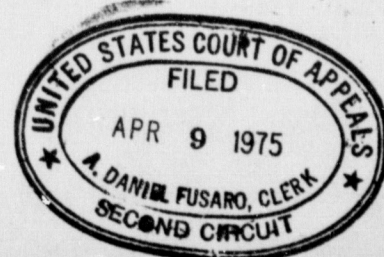
Docket No. 75-1066

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Appellee,
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QUESTION PRESENTED

Whether there are any non-frivolous issues to be presented
to this Court on appeal.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States Dis-
trict Court for the Eastern District of New York (The Honorable

John R. Bartels) entered February 14, 1975, re-sentencing appellant, upon a plea of guilty, for theft of meat from interstate shipment. Appellant was sentenced as a young adult offender to six years' imprisonment, pursuant to 18 U.S.C. §§4209 and 5010(b).

This Court granted leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

In a two-count indictment,* appellant and a co-defendant, Edward Ramos, were charged with the armed hijacking on January 13, 1974, of a truck containing an interstate shipment of approximately 39,000 pounds of beef, in violation of 18 U.S.C. §§659 and 924(c)(1).

Appellant was arrested and arraigned before The Honorable Orrin G. Judd on January 23, 1974. On February 5, 1974, appellant retained Stanley Kline, Esq., to represent him, and the co-defendant, Edward Ramos, retained Howard Jacobs, Esq.

On April 1, 1974, the date set for trial, appellant appeared in the District Court before Judge Mishler and, on appellant's application, Howard Jacobs, Esq., was substituted for Mr. Kline

*The indictment is "B" to appellant's appendix.

as appellant's retained counsel. That same day appellant and the co-defendant, jointly represented by Mr. Jacobs, pleaded guilty to Count One of the indictment (Transcript of April 1, 1974, at 3-12).

On October 4, 1974, appellant and the co-defendant appeared before Judge Mishler for sentence, jointly represented by Mr. Jacobs. At appellant's sentence, which came first, Judge Mishler expressed concern over a possible conflict of interest arising from the co-defendant's extensive cooperation with the Federal authorities (Transcript of October 1, 1974, at 5). Judge Mishler offered to relieve retained counsel and assign counsel from The Legal Aid Society (Transcript of October 1, 1974, at 8-9). However, apparently anxious to avoid any further delay,* appellant declined the offer and requested that he be sentenced that day. Thereupon, Judge Mishler sentenced appellant to six years' imprisonment as a young adult offender, pursuant to 18 U.S.C. §§4209 and 5010(b)** (Transcript of October 1, 1974, at 11).

*Appellant had been in custody unable to post bail approximately ten months at this point.

**An appeal was taken from this judgment (Doc. No. 74-2641). Howard Jacobs moved this Court to be relieved as counsel on appeal because appellant had charged him with conflict of interest and ineffective assistance. This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel for purposes of the appeal. That appeal, however, was subsequently withdrawn on January 24, 1975, based on Judge Mishler's order vacating the original judgment.

On November 1, 1974, Judge Mishler sentenced the co-defendant, Edward Ramos, to five years' probation, pursuant to 18 U.S.C. §5010(a) (Transcript of November 1, 1974, at 8).

On November 14, 1975, appellant filed a pro se request for re-sentence based on defense counsel's conflict of interest, alleging that he was deprived of effective assistance of counsel at the sentencing proceeding.* Following a hearing conducted before Judge Mishler on January 17, 1975, the original sentence was vacated** and the case was transferred to Judge Bartels for re-sentence.

In anticipation of re-sentence, appellant was interviewed by representatives of two therapeutic, community-based rehabilitation programs.*** Appellant was found suitable by both, and letters of acceptance, together with brochures detailing the facilities of each, were forwarded to the sentencing court, the Probation Department, and the United States Attorney, along with a sentencing memorandum urging the District Court to consider alternatives to incarceration on re-sentence.

*Judge Mishler treated this request as a motion to vacate sentence under 28 U.S.C. §2255. The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel, and the matter was set down for a hearing at which appellant, the co-defendant, and Howard Jacobs, Esq., were directed to appear.

**In addition, Judge Mishler offered to set aside the guilty plea; however, appellant wished to have the guilty plea stand.

***These programs are SERA and Project RETURN, both of which are located in New York City.

Appellant appeared for re-sentence on February 14, 1975, before Judge Bartels.* The record reflects that the Court gave appellant's sentencing proposals careful consideration (Transcript of February 14, 1975, at 17-21), but the Court felt that, in this case, the appropriate sentence was the one Judge Mishler had originally imposed. Accordingly, Judge Bartels re-sentenced appellant to the Federal Reformatory as a young adult offender for six years, pursuant to the Youth Corrections Act, 18 U.S.C. §§4209 and 5010(b) (Transcript of February 14, 1975, at 23).

Statement of Possible Legal Issues

At the time Judge Mishler vacated the original sentence pursuant to the proceeding under 28 U.S.C. §2255, he offered appellant the opportunity to vacate his plea of guilty and proceed to trial. Appellant declined this offer. For this reason, the only possible legal issue in this case relates to the re-sentence by Judge Bartels on February 14, 1975, and specifically whether the District Court gave adequate consideration to the alternatives to incarceration which appellant proposed.

In a pre-sentence memorandum, appellant urged the Court to follow recommendations of the American Bar Association Pro-

*By the time of the re-sentence, appellant had already been in custody approximately thirteen months, most of which had been spent at Federal Detention Headquarters at West Street.

ject on Standards for Criminal Justice, which encourage the court in sentencing to consider the least restrictive alternative compatible with the rehabilitation of the defendant, the nature of the offense, and the protection of society:

The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.

American Bar Association
Project on Standards for
Criminal Justice, SENTENC-
ING ALTERNATIVES, §2.2 at
14 (Approved Draft 1968).

See also MODEL PENAL CODE, Sentence Provision §7.01(1) (1967).

While the Court was not receptive to the alternatives proposed, the record amply reflects that the Court examined those proposals and gave them careful consideration. The sentence imposed pursuant to the Youth Corrections Act is within permissible limits and is less harsh than one which could otherwise have been imposed.

CONCLUSION

For the above-stated reasons, there are no non-frivolous issues which can be raised on appeal; accordingly, The Legal Aid Society, Federal Defender Services Unit, should be relieved as counsel on this appeal.

Respectfully submitted,

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E. THOMAS BOYLE,
Of Counsel

April 9, 1975

CERTIFICATE OF SERVICE

4/9

, 1975

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

E. Thomas Doyle